No. 96-1508

Supreme Court, U.S.
FILED
APR 23 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MICHELLE PRICKETT, BOBBY PRICKETT, and RITA ROBERTSON, as Administrators of the Estate of Jeffrey Prickett, deceased,
Petitioners,

v.

NORFOLK SOUTHERN RAILWAY COMPANY and DAVID W. STEPHENS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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RESPONDENTS' BRIEF IN OPPOSITION

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April 23, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

18 pp

QUESTION PRESENTED

Whether this Court should review a decision rendered without opinion by the Alabama Supreme Court where there is an adequate and independent state law basis for that decision and where that court decided that the case was not of sufficient precedential value to merit a written opinion.

LIST OF PARTIES AND RULE 29.6 LIST

All of the parties to the proceeding are listed in the caption to the petition.

Pursuant to Rule 29.6 of the Rules of this Court, respondent Norfolk Southern Railway Company is a subsidiary of Norfolk Southern Corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioners in their petition for writ of certiorari seek review by this Court of a decision of an Alabama state court which was based on state law. The decision of the Alabama trial court, affirmed without opinion by the Alabama Supreme Court, stated:

> [A] complete summary judgment is hereby entered in favor of the defendants on all claims of the plaintiffs on the basis that the contributory negligence of the plaintiffs' decedent was the sole proximate cause of the accident and death here in question.

Pet. App. 23. Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking

review of the judgment of the Supreme Court of Alabama entered in this case because the state law ground is the *only* basis that supports the judgment as to *all* claims.

OPINIONS BELOW

The Order and Judgment of the Calhoun County Circuit Court, handed down on November 23, 1994, and entering summary judgment for the respondents, is an unpublished opinion and is included in the petitioners' Appendix at 4-23. The unanimous decision of the Alabama Supreme Court was issued on October 11, 1996, affirming without opinion the decision of the Calhoun County, Alabama, Circuit Court. This affirmance is not reported but is in the petitioners' Appendix at 1-2. On December 13, 1996, the Alabama Supreme Court overruled petitioners' application for rehearing without opinion. Pet. App. 3.

STATEMENT OF JURISDICTION

Respondents respectfully submit that this Court does not have jurisdiction of this case under 28 U.S.C. § 1257(a) because the decision of the Alabama Supreme Court has an adequate and independent state law basis.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Although there are several such provisions (including 45 U.S.C. § 434, currently codified at 49 U.S.C. § 20106, and 23 U.S.C. § 409) that would be involved in review of that portion of the state court decision below which relied on federal law, the only provision which might help to explain the posture of this case and why this petition should be denied is Rule 53 of the Alabama Rules of Appellate Procedure. It is reproduced in the Appendix to this brief at 1a-2a.

STATEMENT OF THE CASE

1. The incident which is the basis of this lawsuit occurred on December 28, 1992, when Jeffrey Prickett, the driver of a pickup truck, drove without stopping past an advance warning sign, a stop ahead sign, painted pavement markings, a railroad crossbuck sign and a regulation stop sign onto a railroad track just as the train was reaching the crossing. (C 130-32, 152, 1113-19). Prickett died in the resulting collision. The personal representatives of the deceased driver are the petitioners in this case. They presented affidavits for the purpose of showing that the train horn had not been sounded as it approached the crossing (as required by Alabama state law). Pet. App. 9; (C 532-33). However, the trial court concluded that, if the driver had stopped as he was required to do under state law, "there is nothing that would have kept him from seeing the approaching train." Pet. App. 10-11.

Petitioners did not contend before the Alabama Supreme Court that Mr. Prickett stopped at the stop sign. Pet. App. 61-65. Instead, they argued that his failure to stop for the regulation stop sign was reasonable and prudent behavior. Pet. App. 64. Both the Alabama trial court and the Alabama Supreme Court rejected petitioners' contention under state law. That holding raises the only question that can be presented in this case.

2. Petitioners filed this suit in Calhoun County, Alabama, Circuit Court, against the railroad company operating the train (respondent Norfolk Southern Railway Company) and the train engineer. Petitioners' claims, brought under Alabama state law, were based on their allegations that the defendants had negligently and/or wantonly operated the train on the date of the accident, and that the railroad was negligent and/or wanton with regard to the adequacy of the traffic control devices present at the crossing on the date in question. (C 2-11). After extensive

fact discovery, the state trial court granted defendants a *complete* summary judgment "on the basis that no reasonable juror could find that the driver's contributory negligence was not the sole proximate cause of the accident and death here in question." Pet. App. 10, 23.

Although the Alabama state law of contributory negligence provided the only basis completely to resolve the case, the state trial court also went on to rule that two particular claims of the petitioners were preempted by federal law in any event. Granting summary judgment to the defendants *as to those claims,* the state trial court, following this Court's opinion in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), held that any claims based on the speed of the train or on the adequacy of the traffic control devices at the crossing at the time of the accident were preempted Pet. App. 8, 11-23.

The Alabama Supreme Court unanimously affirmed the trial court decision without opinion, citing instead Alabama Rules of Appellate Procedure 53(a)(1) and (a)(2)(E), which provide that "an opinion in the case would serve no significant precedential purpose" and that the summary judgment was "supported by the record." App. 1a. Petitioners seek a writ of certiorari from this nonopinion affirmance of a trial court's decision which was plainly based on state law. The petition should be denied.

REASONS TO DENY THE PETITION

The Alabama Supreme Court affirmed the decision of the Calhoun County Circuit Court which granted respondents complete summary judgment on state law contributory negligence grounds. Pet. App. 8-11, 23. In addition, the trial court granted partial summary judgment as to claims regarding the speed of the train and the adequacy of the signs at the crossing on the basis of federal preemption. Pet. App. 8, 11, 22-23.

As the case was presented on appeal, the Alabama Supreme Court could have affirmed on the basis of state law, or could have affirmed in part and reversed in part by affirming either as to the state law basis for summary judgment or as to the federal preemption basis for partial summary judgment. The Alabama Supreme Court simply affirmed without opinion.

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS AN ADEQUATE AND INDEPENDENT STATE LAW BASIS FOR THE DECISION OF THE ALABAMA SUPREME COURT.

By cases too numerous to cite, it has long been the law that where there is an adequate and independent state law basis for the decision of a state court, this Court lacks jurisdiction to review the case. For example, in *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986), this Court observed:

> Given the reliance of the Alabama Supreme Court on its procedural rule governing the presentation of affirmative defenses, we first decide whether that rule in this case represents an independent and adequate state ground supporting the judgment below. If it does, our review is at an end, for we have no authority to review state determinations of purely state law. Nor do we review federal issues that can have no effect on the state court's judgment.

In this case, the decision of the Alabama court at issue is supported by the adequate and independent state law ground that the petitioners' decedent's contributory negligence in failing to stop for the stop sign at the crossing was the sole proximate cause of the accident.

The Alabama Supreme Court did not write an opinion explaining its affirmance of the trial court. However, the court did cite the cases of *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Borden v. CSX Transportation, Inc.*, 843 F. Supp. 1410 (M.D. Ala. 1993), in affirming the trial court. To understand the

court's citation of these cases, it is necessary to look at the opinion of the trial court.

The Calhoun County Circuit Court cited *Borden* as support for granting respondents summary judgment based on the state law ground of contributory negligence. The court stated:

> [T]he plaintiffs have not submitted any evidence controverting testimony submitted by defendants that plaintiffs' decedent never stopped for the stop sign at the crossing. Whether the horn was sounded properly is immaterial and irrelevant on this issue. As plaintiffs' decedent was under an obligation under Alabama law to stop, look and listen in obedience to the stop sign at the crossing, and the undisputed evidence is that he failed to do so, defendants' Motion for Summary Judgment is granted on the basis that no reasonable juror could find that the driver's contributory negligence was not the sole proximate cause of the accident and death here in question. *Middaugh v. City of Montgomery*, 621 So. 2d 275 (Ala. 1993), and *Borden v. CSX Transp., Inc.*, 843 F. Supp. 1410 (M.D. Ala. 1993).

Pet. App. 9-11.

All of this discussion is plainly based on well-established state law. The proposition that the motorist is "held to have seen that which was there to be seen" is clearly a matter of state law. *Hood v. Murray*, 547 So. 2d 75, 78 (Ala. 1989) (affirming a directed verdict against a motorist on a negligence claim where the evidence established that the other vehicle in the accident at issue "was close enough to constitute an immediate hazard and could have been discovered by [the motorist] in time to avoid injury"). The trial court in this case proceeded to grant respondents summary judgment as to all of petitioners' claims on the basis that the contributory negligence of their decedent in failing to stop for the stop sign at the railroad grade crossing "was the sole proximate cause of the accident and death here in question." Pet. App. 23.

This judgment is clearly supported by repeated Alabama precedent. *See Middaugh v. City of Montgomery*, 621 So. 2d 275 (Ala. 1993) (granting defendants summary judgment on the basis that the negligence of the driver of the vehicle was the sole proximate cause of the accident); *Lambeth v. Gulf, Mobile & Ohio R.R.*, 141 So. 2d 170 (Ala. 1962) (affirming a directed verdict for the railroad where the plaintiff motorist's view of the crossing and train at issue was not obstructed); *Watson v. Birmingham So. R.R.*, 66 So. 2d 903 (Ala. 1953) (affirming a directed verdict for the railroad where there was nothing to obstruct the plaintiff motorist's view of the crossing and train); *National R.R. Passenger Corp. v. H & P, Inc.*, 949 F. Supp. 1556 (M.D. Ala. 1996) (granting railroad's motion for summary judgment under Alabama law as to the negligence of the driver of a tractor trailer truck involved in a collision with an Amtrak train and citing numerous Alabama cases regarding motorists' duty at railroad grade crossing intersections); *Gibson v. Norfolk Southern Corp.*, 878 F. Supp. 1455 (N.D. Ala. 1994), *aff'd without opinion*, 48 F.3d 536 (11th Cir. 1995) (granting summary judgment for the railroad under Alabama law where the evidence established that the motorist's view of the automatic flashing lights at the crossing was unobstructed); *Borden v. CSX Transp., Inc.*, 843 F. Supp. 1410 (M.D. Ala. 1993) (ruling that under Alabama law, the contributory negligence of plaintiff's decedent was the sole proximate cause of the collision with a train). These cases fully explain the decision of the Alabama Supreme Court to affirm without opinion.

It cannot be disputed that the trial court decision, affirmed without opinion by the Alabama Supreme Court, granted respondents summary judgment on alternative grounds. One ground was state law; the other ground was federal law. This is clearly stated in the opinion of the trial court, which is the only opinion available for this Court to consider. As a result, the decision of the Ala-

bama courts has a clearly stated adequate and independent state law basis. Accordingly, the petition for certiorari should be denied.

Moreover, the state law ground is actually the *only* ground that supports the complete summary judgment in this case. If the trial court's opinion had been based simply on federal law, without a discussion of the effect of the petitioners' decedent's failing to stop for the stop sign, there would have been a trial at which a jury would have been asked to resolve whether the train horn was properly sounded before the accident, whether the train crew kept a proper lookout, and the issue of subsequent negligence following the train crew's discovery of the petitioners' decedent in a position of peril (none of these claims was subject to any argument that they were pre-empted by federal law).

The cases of *Michigan v. Long*, 463 U.S. 1032 (1983), and *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185 (1995), cited by petitioners, do not indicate a different result. The holdings of the state courts involved in *Michigan v. Long* and *Arizona v. Evans* appeared to be based squarely on federal law because the federal and state constitutional provisions were identical. Here, by contrast, in the only opinion available to this Court for review, the trial court granted complete summary judgment based solely on state law. The alternative (partial) summary judgment which was based on federal law would have only removed two claims from the case: any claim based on the speed of the train and any claim based on the adequacy of the signs at the crossing. Because the decisions below were plainly and expressly based on an adequate and independent state law ground, the presumption toward jurisdiction expressed in *Michigan v. Long* does not and should not apply.

II. THE PETITION SHOULD BE DENIED BECAUSE, TO THE EXTENT THE DECISION OF THE ALABAMA SUPREME COURT IS BASED ON FEDERAL LAW AT ALL, IT SIMPLY FOLLOWS THE DECISION OF THIS COURT IN *CSX TRANSPORTATION, INC. v. EASTERWOOD*, 507 U.S. 658 (1993).

While the opinion of the trial court makes it unmistakably clear that the Alabama Supreme Court's "no opinion" decision affirming the trial court in this case has an adequate and independent state law ground, that part of the decision of the Alabama court was also correct on a federal basis, because it simply followed the decision of this Court in *Easterwood*. Of course, as to its holding regarding preemption of state law claims based on the speed of the train, the decision simply follows this Court's holding in *Easterwood*. This ruling on federal law by the Alabama court is consistent with the well-established body of lower court cases that also have followed *Easterwood* on this point. Although the post-*Easterwood* cases that are consistent with the Alabama court on the issue of train speed are too numerous to cite, examples include *Bowman v. Norfolk Southern Railway*, No. 94-1204, 1995 WL 550079 (4th Cir. Sept. 15, 1995) (unpublished decision); *Gibson v. Norfolk Southern Corp.*, 878 F. Supp. 1455 (N.D. Ala. 1994), *aff'd without opinion*, 48 F.3d 536 (11th Cir. 1995); *National Railroad Passenger Corp. v. H & P, Inc.*, 949 F. Supp. 1556 (M.D. Ala. 1996); and *Thirkill v. J. B. Hunt Transport, Inc.*, 950 F. Supp. 1105 (N.D. Ala. 1996).

As to its holding regarding preemption of state law claims based on the adequacy of the traffic control devices at the crossing, the Alabama court's decision in this case is consistent with the decisions of three courts of appeals, including *Armijo v. Atchison, Topeka & Santa Fe Railway*, 87 F.3d 1188 (10th Cir. 1996); *Elrod v. Burlington Northern Railroad*, 68 F.3d 241 (8th Cir. 1995); and *Hester v. CSX Transportation, Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815

(1996), all of which also followed this Court's *Easterwood* decision on this issue. Thus, granting the petition for certiorari in this case would be solely to provide an advisory opinion in a situation where the state court has simply declared that it is following the precedent of this Court as expressly declared by this Court and as subsequently explained by the federal courts of appeal. Obviously no useful purpose would be served by such an effort by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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"OPINIONS AND 'NO OPINION' CASES OF THE SUPREME COURT AND THE COURT OF CIVIL APPEALS":

(a) Affirmance Without Opinion. The Supreme Court or the Court of Civil Appeals may affirm a judgment or order of a trial court without an opinion if the court determines:

(1) That an opinion in the case would serve no significant precedential purpose; and

(2) That one of the following circumstances exists:

(A) The judgment or order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous;

(B) The evidence adequately supports the jury verdict on which the judgment or order is based;

(C) In a nonjury case in which the judge has made no specific findings of fact, the evidence would support those findings that would have been necessary to support the judgment or order;

(D) The order of an administrative agency is sufficiently supported by the evidence in the record;

(E) The appeal is from a summary judgment, a judgment on the pleadings, or a judgment based on a directed verdict, and that judgment is supported by the record; or

(F) The court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law.

(b) Designation of Category. When the Supreme Court or the Court of Civil Appeals affirms a judg-

ment without an opinion, it shall in its order of affirmance designate the case as a "No Opinion" case and in its order of affirmance it shall also cite section (a)(1) of this rule and that subpart of section (a)(2) relied upon by the court in its decision to write no opinion.

(c) Publication of Decisions. The reporter of decisions shall publish all opinions of the Supreme Court and the Court of Civil Appeals in the official reports of Alabama decisions, but the text of an order of affirmance in a "No Opinion" case shall not be published in the official reports. The "No Opinion" cases of each court shall be collected in a periodic "Table of Decisions Without Published Opinions," which shall be published in the official reports and which shall indicate the action taken in all "No Opinion" cases. However, if in a "No Opinion" case a Justice or Judge writes a special opinion, either concurring with or dissenting from the action of the court, the reporter of decisions shall publish that special opinion, along with a statement indicating the action to which the special opinion is addressed.

(d) Unpublished Decisions Not Precedent. Orders of judgments of the Supreme Court and the Court of Civil Appeals not published in the official reports have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrines of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar.

(e) Time of Publication. An opinion of the Supreme Court shall not be published while an application for rehearing is pending, and an opinion of the Court of Civil Appeals shall not be published while an application for rehearing is pending or while a petition for certiorari review is pending in the Supreme Court. However, the delay in publication caused by this provision shall not affect the precedential value of an opinion.